APPENDIX A — SUGGESTION OF REHEARING *EN BANC* AND PETITION FOR REHEARING DATED DECEMBER 9, 1998

UNITED STATES COURT OF APPEAL
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

CASE NO. 95-5137

BMC INDUSTRIES, INC.,

Plaintiff/Appellee,

vs.

BARTH INDUSTRIES, INC.; NESCO HOLDINGS, INC. f/k/a NESCO, INC.; NESCO, INC. f/k/a NESCO MANAGEMENT, INC.; BARTH INDUSTRIES CO. LIMITED PARTNERSHIP and BIC CORPORATION,

Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

SUGGESTION OF REHEARING *EN BANC* OF APPELLEE BMC INDUSTRIES, INC. AND PETITION FOR REHEARING

Appendix A

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BMC INDUSTRIES, INC. V. BARTH INDUSTRIES

Case No. 95-5137

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to *Fed. R. App. P.* 26.1 and the corresponding Circuit Rules, the following constitutes a complete list of the trial judge, all attorneys, persons, associations of persons, firms, partnerships or corporations that may have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations and other identifiable legal entities related to a party:

1. Charles M. Auslander, Esquire
2. Richard S. Banick, Esquire
3. William Clayton, Esquire
4. John Kelso, Esquire
5. Steven Stark, Esquire
6. Barth Industries Co. Limited
7. Barth Industries, Inc.
8. Rebecca E. Bender, Esquire

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9. BIC Corporation

10. Michale J. Black, Esquire

11. BMC Industries, Inc.

12. John G. Crabtree, Esquire

13. Samuel J. DeMarco

14. Arthur J. England, Jr., Esquire

15. Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A.

16. Honorable Barry L. Garber, U.S. District Court, Southern District of Florida

17. Honorable Donald L. Graham, U.S. District Court, Southern District of Florida

18. Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A.

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21. Bruce A. Weihe, Esquire

22. Kenneth W. Waterway, Esquire

23. Heinrich Gordon Hargrove Weihe & James, P.A.

24. Richard N. Legan

25. Honorable Stanley Marcus, U.S. District Court, Southern District of Florida

26. Honorable K. Michael Moore, U.S. District Court, Southern District of Florida

27. Honorable Federico A. Moreno, U.S. District Court, Southern District of Florida

28. Nesco Holdings, Inc. f/k/a Nesco, Inc.

29. Nesco, Inc. f/k/a Nesco Management, Inc.

30. Oppenheimer Wolff & Donnelly

31. Honorable Peter R. Palermo, U.S. District Court, Southern District of Florida

32. Steven Schmoll

33. Robert J. Tomsich

34. Mark P. Wine, Esquire

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CERTIFICATION OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance. Specifically, the intercircuit conflict created by the panel decision frustrates the very purpose of the Uniform Commercial Code which has been adopted in forty-nine states to achieve uniformity and avoid confusion in commercial transactions.

s/ John R. Hargrove
John R. Hargrove
Attorney of Record for appellee,
BMC Industries, Inc.

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SECONDARY RESOURCES

6 Corbin, *Corbin on Contracts* 211 (1962) 5

Eisler, *Oral Modification of Sales Contracts Under the Uniform Commercial Code: The Statute of Frauds Problem*, 58 Wash. U.L.Q. 277, 298-302 (1980) 5

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STATEMENT OF ISSUE FOR *EN BANC* CONSIDERATION

THE PANEL DECISION ACKNOWLEDGES ON ITS FACE THAT ITS DECISION REGARDING WAIVER UNDER THE UCC EXPRESSLY AND DIRECTLY CONFLICTS WITH ALL OTHER CIRCUITS WHICH HAVE ADDRESSED THE ISSUE.

INTRODUCTORY STATEMENT

This is a commercial diversity case governed by Florida law. The matter is being submitted for *en banc* review because of an express and direct intercircuit conflict recognized by the panel in its opinion. Specifically, the panel has decided an issue dealing with the definition of "waiver" under Article 2 of the Uniform Commercial Code contrary to Chief Judge Posner's Seventh Circuit opinion on the same point, which decision — without exception — has been cited with approval and followed by every court and treatise dealing with the question. Because of the widespread commercial implications of this newly-created split of authority relating to a fundamental issue under Article 2, BMC urges *en banc* review or, in the alternative, certification of the issue to the Florida Supreme Court by the deciding panel.

STATEMENT REGARDING COURSE OF PROCEEDINGS AND DISPOSITION

In October 1986, BMC signed a contract with BARTH to design, manufacture and install a system to automate production of plastic eyeglass lenses. (P-Ex. 32; P-Ex. 34)

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The contract stated that BMC was relying on BARTH's expertise to design an appropriate system to meet BMC's needs. The record makes it clear that (a) BARTH, which was not the lowest bidder, was chosen because of its corporate affiliation with NESCO, and (b) after multiple completion date extensions had come and gone, BMC stayed with the project because of its reliance on NESCO's assurances that the project would be completed eventually. The jury was presented with all of this evidence and returned verdicts against BARTH and NESCO respectively for breach of contract and promissory estoppel in the amounts of $3 million and $2.1 million. A panel of this court has reversed for a new trial as to BARTH and for the entry of judgment in favor of NESCO.

STATEMENT OF ESSENTIAL FACTS

Despite fourteen promised completion dates which had come and gone, despite repeated warnings issued to BARTH by BMC to deliver a workable system (spanning a period of more than twenty months beyond the final contract delivery deadline), despite BMC's reliance upon BARTH's parent company, NESCO, which promised that the project would be completed, *no workable system was ever delivered to BMC.* In early June of 1989, BMC sued.

Prior to trial, BARTH and NESCO had moved for partial summary judgment claiming that the contract was for "goods", not "services"; that the UCC therefore applied; that under the UCC, BMC failed to give an acceptable "notice of breach" and "reasonable opportunity to cure"; and that consequently BMC was not entitled to relief under the

contract. BMC prevailed on the issue, the trial court holding that the common law — not the UCC — governed the transaction. (R12:464)

The deciding panel reversed for a new trial as to BARTH concluding that the UCC should have been applied; that under the UCC, "waiver" of a performance deadline by a buyer does not require "detrimental reliance" by a seller; that BMC, as the buyer waived the performance deadline as a matter of law; that the performance deadline was therefore extended for a "reasonable time"; and that a new jury should therefore decide whether the extended time for performance was reasonable or not. The panel reversed the promissory estoppel verdict against NESCO, and directed the entry of judgment in its favor, holding that the statute of frauds barred recovery.

ARGUMENT FOR REHEARING *EN BANC*

THE PANEL DECISION ACKNOWLEDGES ON ITS FACE THAT ITS DECISION REGARDING WAIVER UNDER THE UCC EXPRESSLY AND DIRECTLY CONFLICTS WITH ALL OTHER CIRCUITS WHICH HAVE ADDRESSED THE ISSUE.

The panel's decision turned on its interpretation of "waiver" under § 2-209(4) of the Uniform Commercial Code, which had been adopted in Florida as *Florida Statutes* § 672.209(4). In analyzing the issue, the panel acknowledged that it was creating express and direct conflict with Chief Judge Posner's decision in *Wisconsin Knife Works v. Nat'l Metal Crafters*, 781 F. 2d 1280 (7th Cir. 1986). That case holds that a waiver under the UCC *must be supported by*

detrimental reliance — which is precisely how the issue was decided by the jury in this case under stipulated instructions.

In *Wisconsin Knife Works*, the buyer had contracted for the purchase of spade bit blanks to use in its manufacturing process. The parties had agreed that no modification of the contract would be binding unless made in writing and signed by the buyer's representative. When the seller later failed to meet the contractual deadline, the buyer sued for breach of contract. The seller claimed that based on the buyer's conduct, the buyer had waived the deadline. The district court agreed with the seller and entered judgment in its favor.

On appeal, the Seventh Circuit reversed. In so ruling, the court analyzed the question of whether the seller could nullify the contract term requiring that modifications be in writing simply by relabelling the buyer's conduct as a "waiver" under § 2-209(4), rather than calling it a "modification" under § 2-209(2). Writing for the court, Chief Judge Posner explained that the buyer's conduct could not be deemed a waiver without detrimental reliance on the part of the seller. He reasoned as follows:

> If § 2-209(4), which as we said provides that an attempted modification which does not comply with subsection (2) can nevertheless operate as a "waiver," is interpreted so broadly that any oral modification is effective as a waiver notwithstanding § 2-209(2), both provisions become superfluous . . . . The path of reconciliation with subsection (4) is found by attending to the precise wording of (4). It does not

> say that an attempted modification "is" a waiver; it says that "it can operate as a waiver." It does not say in what circumstances it can operate as a waiver; *but if an attempted modification is effective as a waiver only if there is reliance, then both §§ 2-209(2) and 2-209(4) can be given effect.*

Id. at 1286-87 (Emphasis added) The court went on to say:

> Reliance, if reasonably induced and reasonable in extent, is a common substitute for consideration in making a promise legally enforceable, in part because it adds something to the way of credibility to the mere say-so of one party. . . . We find support for our proposed reconciliation of subsections (2) and (4) in the secondary literature. *See* Eisler, *Oral Modification of Sales Contracts Under the Uniform Commercial Code: The Statute of Frauds Problem*, 58 Wash. U.L.Q. 277, 298-302 (1980); Farnsworth, *Contracts*, at 476-77 (1982); 6 Corbin, *Corbin on Contracts*, 211 (1962).

Id.

In reaching the conclusion that the two provisions are not superfluous and that a "waiver" is effective only where there is reliance by the non-waiving party, the Seventh Circuit appropriately construed "modification" and "waiver" in such a way as to give independent, but reconcilable, meaning to both subsections (2) and (4). *See generally* White & Summers, *Uniform Commercial Code*, § 1-6, at 33-34 (West 1995). This

rule of statutory construction is precisely what Florida courts require. Courts must interpret statutes as to give effect to *all* statutory provisions. *See, e.g., Unruh v. State*, 669 So. 2d 242 (Fla. 1996); *Forsythe v. Longboat Key Beach Erosion Control District*, 604 So. 2d 452 (Fla. 1992). The Fourth Circuit has followed *Wisconsin Knife*. *See Flowers Ginning Corp. v. Arma, Inc.*, 106 F. 3d 390, 1997 WL 26573 (4th Cir. 1997). In accordance with 11th Cir. R. 36-2, a copy of that opinion is attached hereto as Exhibit "A". As Chief Judge Posner stated in *Wisconsin Knife*, the draftsmen of § 2-209 "did not just want to give 'modification' another name — 'waiver' ". 781 F. 2d at 1288. To the contrary, the drafters intended independent meaning, yet the panel's decision disrupts that intent. *En banc* review is therefore requested.

PETITION FOR REHEARING
SUGGESTION OF CERTIFICATION

Since Florida courts have not directly addressed the waiver issue under *Florida Statutes* § 672.209(4), the panel on rehearing may wish to consider certifying the "waiver" issue to the Florida Supreme Court. The commercial implications of the decision are indeed far reaching, and the Florida Supreme Court should be afforded the opportunity to determine whether Florida UCC law follows the panel's view or the view of the Seventh and Fourth Circuits and commentators.

ARGUMENT FOR REHEARING

At trial, counsel for BARTH and NESCO *conceded* that the relevant UCC and contract law principles were the same.

(T:1017) The jury was then instructed on the issue of waiver under contract law based on BARTH and NESCO's own requested instructions. (R15:561-30-32; R15:561-43) Since the law in this circuit does not permit a party to benefit from an alleged error which it not only *concedes* but *invites*, the panel never should have addressed the UCC issue in the first place. *See, e.g.*, *United States v. Paradise*, 98 F. 3d 1266, 1285 (11th Cir. 1996), *United States v. Chandler*, 996 F. 2d 1073, 1084 (11th Cir. 1993); *Leverett v. Spears*, 877 F. 2d 921, 924 (11th Cir. 1989).

As to promissory estoppel, the court reversed because it viewed NESCO's promise as "collateral", rather than "direct." The Florida Supreme Court, however, has held that this is a question of fact for the jury, *Bruce Construction Corp. v. State Exchange Bank*, 102 So. 2d 288 (Fla. 1958), and the jury in this case was properly instructed on the point *in accordance with NESCO's own requested instruction.* (T:1963; R15:561-73). *See Hilkmeyer v. Latin American Air Cargo Expediters*, 94 So. 2d 821, 825-26 (Fla. 1957).

CONCLUSION

In reversing the jury's verdict below, the panel has created express and direct conflict on a significant issue in the area of commercial law. The court is urged to review this case *en banc* or certify the issue to the Florida Supreme Court.

Appendix A

EXHIBIT A

FLOWERS GINNING COMPANY, INCORPORATED, d/b/a Warren Brothers Gin, Plaintiff-Appellee,

v.

ARMA, INCORPORATED; Ritch McCutchen, Defendants-Appellants.

No. 96-1314.

United States Court of Appeals, Fourth Circuit.

Argued Dec. 4, 1996.

Decided Jan. 24, 1997.

* * *

Before WIDENER and HAMILTON, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

OPINION

PER CURIAM:

ARMA, Inc. (ARMA), a distributor of cotton ginning equipment, appeals the magistrate judge's denial of its motion for judgment as a matter of law, or in the alternative for a new trial, see Fed.R.Civ.P. 50, following a jury verdict in

favor of Flowers Ginning Company, Inc. (Flowers Ginning), a company which had purchased certain ginning equipment from ARMA. We affirm.

I.

Flowers Ginning is a North Carolina corporation which operated a cotton gin in Newton Grove, North Carolina, from 1986 to 1994. Glenn Flowers was the sole shareholder in Flowers Ginning and continually served as its president. Charlie Warren and Tommy Warren (the Warren brothers), Glenn Flowers' nephews, conducted the day-to-day operations of Flowers Ginning. ARMA is a Georgia corporation with its principal place of business in Cordele, Georgia. ARMA sells and installs new and used cotton ginning equipment.

In 1991, Flowers Ginning decided to purchase a universal density (UD) cotton press and other related equipment in order to serve the needs of its customers as well as meet new cotton ginning volume expectations during a boom year for cotton production. Accordingly, ARMA and Flowers Ginning began discussing a deal whereby Flowers would purchase the UD press and related equipment from ARMA. In light of this contemplated deal, Flowers Ginning began informing its customers about its upcoming increased capacity for production and apparently secured oral commitments to gin 12,314 bales of cotton for the 1991 ginning season.

During the second week of July 1991, Flowers Ginning contacted Southern National Bank (Southern National) to discuss financing for the contemplated equipment purchase

from ARMA. On August 19 or August 20, Southern National indicated to Flowers Ginning that it was prepared to make the loan. Accordingly, on or about August 20, Flowers Ginning contacted ARMA's president, Ritch McCutchen (McCutchen), to advise him that it had arranged financing and stood ready to purchase the UD press and other related equipment.

On August 21, McCutchen drafted the written contract at issue here, signed it, and flew to North Carolina to secure Glenn Flowers' signature. For reasons not fully explained in the record, Glenn Flowers was not available to sign the contract that day. Therefore, McCutchen left the contract with Flowers Ginning in North Carolina for Glenn Flowers' signature. The written contract provided that some of the equipment would be delivered immediately; that other equipment would be delivered approximately thirty days from the date the contract was signed; and that other equipment would be delivered within ninety days. Glenn Flowers signed the contract on August 22. That same day, Southern National issued commitment papers for the loan.

On August 26, 1991, Glenn Flowers, the Warren brothers, and Flowers Ginning's corporate attorney, Miles B. Fowler (Fowler), met with Richard DeBose (DeBose), a Southern National executive. According to Flowers Ginning, during a telephone call between DeBose and McCutchen that took place during this meeting, DeBose expressed his desire that the equipment be installed and operational in time for the 1991 ginning season. DeBose's desire rested on his concern that Flowers Ginning would be otherwise unable to repay the loan. DeBose and McCutchen then allegedly agreed that

ARMA would have the UD press and related equipment installed and operational by October 1. DeBose then reported McCutchen's agreement to an October 1 installation and operational deadline to Glenn Flowers and the Warren brothers who were present at the meeting.

In completing the loan closing, DeBose relied heavily on McCutchen's promise to have the UD press and related equipment installed and operational by October 1. In addition, Flowers Ginning authorized Southern National to disburse funds to ARMA only after McCutchen promised to have the UD press and related equipment installed and operational by October 1. At the trial however, McCutchen testified that he and DeBose never discussed ARMA having the UD press and related equipment installed and operational by October 1 and that he did not know that Glenn Flowers and the Warren brothers were in the room during his August 26 telephone conversation with DeBose.

On August 27, 1991, Flowers Ginning, through Southern National, paid ARMA the earnest money called for in the contract. ARMA nonetheless failed to have the equipment installed and operational by October 1. ARMA provided all of the equipment subject to the contract by November 12, 1991, a date within the delivery schedule called for in the original written contract as signed by McCutchen and Glenn Flowers.

Flowers Ginning subsequently filed suit against ARMA in the United States District Court for the Eastern District of North Carolina. The suit alleged claims for breach of contract, fraud, civil conspiracy, recision, and unfair trade practices.

Flowers Ginning sought compensatory damages for: (1) costs it incurred in completing the installation of the UD press and related equipment; and (2) for lost profits that allegedly resulted from ARMA's failure to have the ginning equipment installed and operational by October 1. Specifically, Flowers Ginning determined that it incurred a total of $183,255 for expenses and improvements to finish installing the UD press and related equipment and make the completed gin operational. (J.A. 545-46). In addition, because Flowers Ginning could not conduct ginning operations for the Fall 1991 ginning season, it could not carry through with its commitments to gin 12,314 bales of cotton. For that season and succeeding years, Flowers Ginning asserted lost calculable profits of over $200,000. (J.A. 554, 570-74, 939).

Following discovery, ARMA filed a motion for summary judgment, which the district court granted in part and denied in part. Accordingly, the district court entered judgment for ARMA on Flowers Ginning's claim for civil conspiracy, but allowed the breach of contract, fraud, recision, and unfair trade practices claims to be tried before a jury. Then the parties consented to trial of this matter before a United States Magistrate Judge. See 28 U.S.C. § 636(b)(2) (1990).

Subsequently, ARMA filed a motion in limine to exclude any evidence that the parties orally agreed to modify the contract to set an October 1 installation and operational deadline, rather than a November 19 installation and operational deadline.[1] In support of the motion, ARMA

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1. The ninety day installation and operational deadline provided in the written contract fell on November 19, 1991.

argued that the statute of frauds and the parol evidence rule as contained in the Georgia Commercial Code (GCC), see Ga.Code Ann. §§ 11-2-201 to 202, barred any evidence of an oral modification before August 27, the date Flowers Ginning paid ARMA the "earnest money."[2] Determining that August 21 constituted the effective date of the contract rather than August 27, the magistrate judge denied ARMA's motion. The case then proceeded to trial.

At the close of Flowers Ginning's case, ARMA made a motion for judgment as a matter of law, see Fed.R.Civ.P. 50(a), which the magistrate judge denied. Flowers Ginning then withdrew its recision claim, leaving only its claim for breach of contract against ARMA and its claims for fraud and unfair trade practices against both ARMA and McCutchen. At the close of all the evidence, ARMA renewed its motion for judgment as a matter of law. The magistrate judge denied the renewed motion.

The case proceeded to the jury, which returned a verdict in favor of Flowers Ginning on its breach of contract claim against ARMA and on its unfair trade practices claim against ARMA and McCutchen. Conversely, the jury found in favor of ARMA and McCutchen on Flowers Ginning's fraud

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2. ARMA claimed: (1) without the payment of the earnest money there was no contract, therefore, the contract did not come into effect until August 27, 1991; (2) the only evidence of any oral modification to the contract occurred prior to the payment of the earnest money, and therefore, any evidence of an oral modification should have been excluded as parol; and (3) without any oral modification, there was no breach because it fulfilled its obligations under the contract by November 19, 1991.

claims. The jury awarded $330,555 on the breach of contract claim against ARMA and $1 on the respective unfair trade practices claims against ARMA and McCutchen. Finding insufficient evidence as a matter of law to support the jury's verdict against either defendant for unfair trade practices, the magistrate judge entered judgment in favor of both ARMA and McCutchen on those claims. The magistrate judge did not disturb the jury's verdict on the breach of contract claim.

ARMA subsequently filed a motion for judgment as a matter of law or in the alternative for a new trial, see Fed.R.Civ.P. 50(b), on two grounds. First, ARMA contended that the magistrate judge erroneously allowed the admission of evidence relating to oral contract modifications occurring before August 27, 1991, and without that evidence no reasonable jury could have found it liable for breach of contract. Second, and in the alternative, ARMA contended that even if it breached the contract, Flowers Ginning presented insufficient evidence to support the damage award on the breach of contract claim. The magistrate judge denied the motion. ARMA timely appealed.[3]

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3. Technically, both ARMA and McCutchen appealed the magistrate judge's denial of the motion for judgment as a matter of law, see Fed.R.Civ.P. 50(b). However, once the magistrate judge dismissed the unfair trade practices claim against McCutchen, there was no judgment against him and nothing for him to appeal. Accordingly, throughout this opinion, we refer to ARMA as the only appealing party.

II.

ARMA first argues that the magistrate judge's decision to instruct the jury on the GCC, as opposed to Georgia's general contract law, was erroneous.[4] We disagree.

When the magistrate judge instructed the jury on the applicable law, he framed the case for the jury in terms of the GCC.[5] However, ARMA did not object to the magistrate judge's instructions.

It is settled law that in order to properly preserve an objection to jury instructions, a party must state "distinctly the matter objected to and the grounds for the objection." Fed.R.Civ.P. 51; see Mattison v. Dallas Carrier Corp., 947 F.2d 95, 112 (4th Cir.1991). Because ARMA never objected to the magistrate judge's instructions to the jury on the GCC rather than general Georgia contract law, ARMA failed to preserve that issue for appeal. In any event, the magistrate judge correctly determined that the GCC applied to resolve the breach of contract claim.

Article 2 of the GCC applies to all "transactions in goods," Ga.Code Ann. § 11-2-102, and defines "goods" as

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4. ARMA presumably argues for the application of Georgia general contract law because, as opposed to the GCC, Georgia general contract law arguably contains: (1) stricter requirements for contract formation; (2) a more rigorous parol evidence rule; and (3) a narrower definition of what can constitute compensatory damages once there has been a breach of contract.

5. The parties agree that Georgia law applies to this case.

all things which were moveable at the time those things were identified to the contract. Ga.Code Ann. § 11-2-105(1). According to Georgia law, "[w]hen the predominant element of a contract is the sale of goods, the contract is viewed as a sales contract and the [GCC] applies, 'even though a substantial amount of service is to be rendered in installing the goods.' " J. Lee Gregory, Inc. v. Scandinavian House, 433 S.E.2d 687, 689 (Ga.Ct.App.1993) (quoting Anderson, Uniform Commercial Code, § 2-104:38); see also Beaulieu of Am., Inc. v. Coronet Ind., Inc., 327 S.E.2d 508, 510 (Ga.Ct.App.1985). Only when the predominant element of the contract is the furnishing of services should the contract be viewed as a service contract, thus requiring the application of Georgia general contract law. See, e.g., Mail Concepts v. Foote & Davies, Inc., 409 S.E.2d 567 (Ga.Ct.App.), cert. denied, 200 Ga.App. 896 (1991).

Here, the contract dispute arose over the installation of the UD press and related equipment. Nevertheless, the sale of the UD press and related equipment always constituted the predominant object of the contract. Effectively, the installation amounted to nothing more than a particularized mode and method of delivery. Because the sale of the UD press and related equipment constituted the predominate object of the contract, the GCC applied to resolve Flowers Ginning's breach of contract claim.

III.

Next, ARMA challenges the magistrate judge's decision to admit evidence that the parties modified the contract on

August 26 to set an October 1 installation and operational deadline. According to ARMA, both the statute of frauds and the parol evidence rule as contained in the GCC barred any evidence that the parties orally modified the contract. See Ga.Code Ann. §§ 11-2-201 to 202. We review evidentiary rulings for an abuse of discretion. See Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc., 71 F.3d 119, 126 (4th Cir.1995). "The legal standards the district court applies in making its evidentiary rulings, however, are reviewed de novo." Id.

A.

ARMA argues that the admission of the evidence of the August 26 modification violated the GCC statute of frauds because it was not in writing. This argument has no merit.

The GCC statute of frauds has been interpreted as setting forth three definite requirements for a writing to be sufficient as an enforceable contract: (1) the writing must evidence a contract for the sale of goods; (2) it must be signed by the party to be charged; and (3) it must specify a quantity. O.N. Jonas Co., Inc. v. Badische Corp., 706 F.2d 1161, 1163 (11th Cir.1983); see also Ga.Code Ann. § 11-2-201. A contract for the sale of goods may be made in "any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Ga.Code Ann. § 11-2-204(1). Price, time and place of payment or delivery, general quality of the goods, or any particular warranties may all be omitted and supplied by course of trade or be agreed to on a later date, whether by an additional written instrument

or by oral evidence.[6] Alice v. Robett Mfg. Co., Inc., 328 F.Supp. 1377 (N.D.Ga.1970), aff'd, 445 F.2d 316 (5th Cir.1971).

Georgia case law is unclear as to whether an oral modification must be reduced to writing in order to satisfy the GCC statute of frauds. Like every other state that has adopted § 2-209 of the Uniform Commercial Code as its substantive law dealing with modification of a contract for the sale of goods, GCC § 2-209(3) states that "[t]he requirements of the statute of frauds section of [the GCC] must be satisfied if the contract as modified is within its provisions." Ga.Code Ann. § 11-2-209(3). As two notable commentators on the Uniform Commercial Code have said, "[t]he impact of this provision is not clear." James J. Wright & Robert S. Summers, Uniform Commercial Code § 1-6 at 56 (3d ed.1988). The commentators recognize a split of authority among the states regarding possible interpretations, with one state interpreting the provision to require that if the original contract was within the statute of frauds section, then any modification thereof must also be in writing. Id. Other less stringent interpretations construe the provision as requiring a writing only if the modification brings the entire deal within the statute of frauds for the first time or if it changes the quantity term of the original contract. See id.

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6. The parties do not dispute that the contract in its form on August 21 satisfied the GCC statute of frauds. ARMA and Flowers Ginning intended to enter into a contract for the sale of a UD press and related equipment. ARMA signed a written instrument on August 21, which contained all the necessary indicia of a contract for the sale of goods, including specifying a quantity term. See Ga.Code Ann. § 11-2-201.

Georgia case law does not give us any guidance as to how we should interpret GCC § 2-209(3) for purposes of this litigation. We need not, however, forecast Georgia's interpretation. GCC § 2-209(4) provides that a modification can operate as a waiver of the right to assert a defense under the GCC statute of frauds, see Ryder Truck Lines, Inc. v. Scott, 201 S.E.2d 672, 675 (Ga.Ct.App.1973), and that is the situation here. A modification may operate as a waiver if there is reasonable reliance. Wisconsin Knife Works v. Nat'l Metal Crafters, 781 F.2d 1280, 1287 (7th Cir.1986); Trad Indus., Ltd. v. Brogan, 805 P.2d 54, 59 (Mont.1991). The evidence in the record reveals conduct by ARMA and reliance by Flowers Ginning sufficient to estop ARMA from insisting upon enforcement of the original installation and operational deadline. See Irvin v. Lowe's of Gainsville, Inc., 302 S.E.2d 734, 736 (Ga.Ct.App.1983) (when a promisee reasonably and foreseeably relies on a promise to his detriment, the promise is binding if injustice can by avoided only be enforcement of the promise). Accordingly, ARMA cannot take advantage of the GCC statute of frauds to bar evidence that it and Flowers Ginning orally agreed to modify the contract to provide for an October 1 installation and operational deadline.

B.

The GCC parol evidence rule provides in pertinent part:

> Terms . . . which are . . . set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a

> contemporaneous oral agreement but may be explained or supplemented:
>
> (a) by a course of dealing or usage of trade or by a course of performance; and
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Ga.Code Ann. § 11-2-202. Strongly contending that the contract did not become effective until August 27 when Flowers Ginning paid the earnest money, ARMA contends that the evidence supporting Flowers Ginning's contention that the parties orally modified the contract on August 26 to provide for an October 1 installation and operational deadline, rather than November 19, should have been excluded under the GCC parol evidence rule as evidence of a prior agreement that contradicted an express term of the written contract. We disagree.

Initially, we note that, notwithstanding ARMA's argument to the contrary, the magistrate judge properly determined that August 21 constituted the effective date of the contract. The contract provided that it "be exercised not before the expiration of 10 days nor after the expiration of 90 days from the date hereof." (J.A. 1275). Because the contract was signed by ARMA's president on August 21, 1991, that date constituted the "date hereof." Id. August 21 constituted the effective date of the contract despite subsequent language in the contract that suggested the

contract would not become effective until Flowers Ginning paid ARMA the earnest money. Specifically, the contract provided that "[t]he buyer shall consummate the purchase during said period by tendering the purchase price in the manner described above." (J.A. 1275). The contract called for $263,130 to be paid in earnest money that would be "credited against the purchase price when [the contract] is consummated." (J.A. 1274). At best then, the contract is ambiguous with respect to its effective date. Because ARMA prepared the contract, any ambiguity in its terms must be construed against it. See Considine Co. of Ga., Inc. v. Turner Communications Corp., 273 S.E.2d 652 (Ga.Ct.App.1977). Thus, we cannot say that the magistrate judge erred by concluding that the contract became effective on August 21, the date ARMA's president signed the contract.[7]

Having concluded that the magistrate judge correctly determined that August 21 constituted the effective date of the contract, the GCC parol evidence rule loses all applicability to the evidence which ARMA argues was erroneously admitted. The GCC parol evidence rule bars admission of evidence of any "prior agreement[s]" or any "contemporaneous oral agreement[s]" which contradict the terms of the parties' final written agreement. Ga.Code Ann. § 11-2-202. "[T]he parol evidence rule simply does not apply

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7. ARMA also argues that, during his cross examination, Charlie Warren admitted that there was no contract between Flowers Ginning and ARMA until Flowers Ginning paid the earnest money. ARMA's argument is without merit. Our review of the record reveals that such an admission by Charlie Warren is far from clear, and cannot form a basis for concluding that the magistrate judge erred by determining that the contract became effective on August 21.

to evidence of subsequent agreements or modifications." Wright & Summers, supra at 98; see also Wayman v. Amoco Oil Co., 923 F.Supp. 1322, 1340 (D.Kan.1996) ("The parol evidence rule (UCC § 2-202) does not apply to evidence of subsequent agreements or modifications. . . ."); Muther-Ballenger v. Griffin Elec. Consul., 397 S.E.2d 247, 250 (N.C.Ct.App.1990) (rejecting argument that the parol evidence rule under the North Carolina Commercial Code would bar plaintiff's evidence of oral modifications made subsequent to the written contract). Here, the oral modification occurred on August 26, a date subsequent to August 21, the effective date of the contract. Accordingly, the GCC parol evidence rule did not apply to bar Flowers Ginning's evidence that the parties agreed to orally modify the delivery and installation date from November 19, 1991 to October 1, 1991.

IV.

ARMA's last argument is that the magistrate judge erroneously concluded that Flowers Ginning presented sufficient evidence to support the damage award, beyond more than nominal damages, on the breach of contract claim. This argument has no merit.

Pursuant to Georgia law:

> [T]he measure of damages in the case of a breach of contract is the amount which will compensate the injured person for the loss which fulfillment of the contract would have prevented or the breach of it entailed. In other words, the person injured

> . . . is to be placed in the position he would have been in had the contract been performed.

Bennett v. Associated Food Stores, Inc., 165 S.E.2d 581, 585 (Ga.Ct.App.1968); see also PMS Constr. Co., Inc. v. DeKalb County, 257 S.E.2d 285 (Ga.1979). When items of claimed damages cannot be traced solely to the breaching party's breach, such items cannot be recovered. See Department of Transp. v. Arapaho Constr. Co., 349 S.E.2d 196 (Ga.Ct.App.1986), aff'd, 357 S.E.2d 593 (Ga.1987). Accordingly, at trial, Flowers Ginning bore the burden of furnishing sufficient evidence from which the jury could determine its damages with reasonable certainty. See Hospital Auth. v. Bryant, 277 S.E.2d 322 (Ga.Ct.App.1981).

The record reflects that Flowers Ginning bore its burden of furnishing sufficient evidence from which the jury could determine with reasonable certainty that ARMA's breach of the contract caused Flowers Ginning to sustain total damages of $330,555 in both completion costs and lost profits. Linwood Wooten, Flowers Ginning's certified public accountant, testified as to the costs incurred by Flowers Ginning in order to get the UD press and related equipment installed and operational. (J.A. 545-46). Wooten also testified about lost profits for the 1991 ginning season and for a period thereafter. (J.A. 544, 570-74, 939). The jury, having credited this testimony, leaves us in no position to disturb the jury's award of damages.

Appendix A

V.

For the reasons stated herein, we affirm the judgment entered by the court below.

AFFIRMED

WIDENER, Circuit Judge, dissenting:

I respectfully dissent because I believe the parol evidence rule bars evidence of the parol agreement to change the date set in the written contract.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 30, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-5137, 95-5338

BMC INDUSTRIES, INC.,

Plaintiff-Appellee,

versus

BARTH INDUSTIES, INC.,NESCO, INC.,
f.k.a. Nesco Management, Inc., et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: TJOFLAT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the

Appendix B

Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE